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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 427

SIDNEY E. DAWSON,

Petitioner,

versus

ELLIOTT L. RICHARDSON, Secretary of Health, Education and Welfare,

Respondent.

On Petition for Rehearing in a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner herein invokes Rule 58, Section 2; and states that he adopts the Statement of the Nature and Results of the case as provided and shown in the Petition for a Writ of Certiorari, filed in this Court.

Jurisdiction of Supreme Court Rule 58(2)

A petition for rehearing on a petition for Writ of Certiorari.

The Court denied petition for a writ of certiorari on October 12, 1970. The petitioner now timely asks this

Honorable Court to set aside their denial and hear this cause on substantial grounds available to petitioner although not previously presented, as follows:

POINT 1(a)

The trial court and appellate court erred in the dismissal of this cause for want of jurisdiction with prejudice.

STATEMENT

As a matter of record, which shows the trial court did dismiss this cause for want of jurisdiction is shown herein in the provisions of 42 U. S. C. A. 406 (b) (1), which provides:

> "When a court renders a *judgment favorable* to a claimant under this title who was represented before the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 per cent of the total of past due benefits to which the claimant is entitled by reason of such judgment . . ."

the respondent herein in the trial court alleged this provision of statute, and in addition stated:

DEFENDANT'S DEFENSE

> "There must be a *judgment favorable to the claimant* before the court can award attor-

ney's fees. Duke v. Gardner, 264 F. Supp., 187 (N. D. Georgia, 1967). In the case of a remand the plaintiff's attorney's remedy is through application to the Secretary for attorney's fees."

Among other things, defendant asks the court to dismiss the cause with prejudice. Appendix, p. 26, 27. Tr. 23.

ORDER OF DISMISSAL

On the 2nd day of June, 1969, came on to be heard defendant's motion to dismiss, and the court having examined the pleadings . . . is of the opinion that 42 U.S.C. 406 limits attorney's fees to 25 per cent of claimant's past due benefits, it is therefore ordered adjudged and decreed that plaintiff's complaint is hereby dismissed with prejudice. Signed . . . . . Appendix 29. Tr. 7.

Petitioner's Answer to Respondent's Obtaining a Dismissal for Want of Jurisdiction.

The petitioner as a matter of record has at all times maintained and alleged that in a judicial proceeding resulting *in a remand in favor of the claimant*, the attorney has a right for the court to set a reasonable fee for his services not greater than 25 per cent of the accrued benefits coming to the claimant which is alleged in petitioner's 1st supplementary petition, Ap. 19, and in petitioner's motion for a new trial in Point 1, (Ap. 30) and at all times thereafter.

ARGUMENT AND AUTHORITIES

This whole case hinges on whether the *order on remand* in favor of plaintiff is the same as a judgment for plaintiff, which is determined as set up in the provisions of 42 U. S. C. A. 406 (b) (1) as above set forth.

If in the eyes of the court's decisions that a judgment does not include an order on remand, then in that event the administrator, and proceedings therein, only have jurisdiction, and the petitioner cannot get any more, for he has already received his fee, and the court would be right in dismissing the cause for want of jurisdiction.

On the other hand, if in the eyes of the courts it is said that an *order of remand includes a judgment of court*, then in that event, the jurisdiction of courts have the power to grant attorney's fees as provided by 42 U. S. C. A. 406(b) (1), and the judgment of the trial court and appellate court would lack jurisdiction in this cause, and the same would be void, and should be set aside.

Since the pleadings of the defense say as aforesaid, "there must be a judgment favorable to the claimant before the court can award attorney's fee — In the case of a remand, the plaintiff's attorney's remedy is through application to the Secretary for attorney's fees," and the court dismissed the cause for want of jurisdiction with prejudice, on account of said pleading, the primary cause. Ap. 26, 27, Tr. 23.

THE TRIAL COURT AND APPEALS COURT DID NOT HAVE JURISDICTION ON A REMAND ORDER

> "Court could award an attorney's fee for substantial work done before the court, although the court entered no judgment for specific benefits for alleged disability, but instead, [redacted]ered a remand to Secretary of Health, Education and Welfare, who ultimately forwarded the claim for disability benefits." Conner v. Gardner, 381 F. 2nd 497, 4th Cir. (1967); Robinson v. Gardner, 374 F. 2d, 1967, 4th Cir.; Ray v. Gardner, 387 F. 2d 162, 1967, 4th Cir.; Gardner v. Menedez 373 F. 2d 488, 1st Cir. 1967; Carroll v. Celebrezze, 228 F. Sup. 340; Brown v. Gardner, 387 F. 2d, 345, 1967, 4th Cir.; Philpot v. Gardner, 403 F. 2d 774, 1968, 6th Cir.

By further investigation, other cases could be added to this number. All the above cases held that they had jurisdiction to charge attorney's fee on an order for remand; seven (7) in number, wherein the appellate court holds herein the same judgments and not on remand. Said decision is in direct conflict with said 7 courts, and 4 courts all of the 4th Circuit, one of the First Circuit and one of the 6th Circuit, as shown above.

In the case of Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 34, Headnote 1, as cited also in Supreme Court Rule 58(2) holding:

"There being a conflict of opinion between the two circuits of appeals on the question of infringement, writs of certiorari were thereafter in both cases granted.

"1 Footnote — After handing down the opinion (in Sanitary case) showing the conflict as to the jurisdiction of infringement, was brought to our attention by a petition for rehearing, the certiorari was granted."

Herein the case at bar for conflict of opinions between the courts and circuit courts was not on question of infringement, but on question of whether 42 U. S. C. A. 406 (b)(1), the "judgment" as stated therein also applied to *Order on Remand*. The lower court, affirmed by the appellate court herein, held that the "Order on Remand," was not considered a "judgment."

Therefore, the above authority and case is directly in point.

WANT OF JURISDICTION

The jurisdiction of a federal court is limited to that conferred by the Constitution and statutes of the United States, and cannot be acquired or enlarged by consent, nor by waiver, nor by acquiescence, or inadvertence, nor by silence. Federal Digest under Courts, seeking key numbers 22 and 23.

"Jurisdiction cannot be conferred by consent or failure to raise the same in the trial court." Sec. 23.

TIME OF MAKING OBJECTION

"Where a court has no jurisdiction over the subject matter, it cannot be conferred by the consent of the parties. This want of jurisdiction of the subject matter cannot be waived by a failure to raise the objection in limine, or at any particular stage of the proceeding. The want of such jurisdiction may be raised even on appeal." Panama Ry. Co. v. Johnson, 289 F. 964.

In the case at bar, as we see above, where the court had no jurisdiction over the subject matter as where the trial court and appellate court here had no jurisdiction over the *order to remand* in the U. S. District Court which is prescribed by the Congressional Statute, 42 U. S. C. A., 406 (b)(1), regardless of the parties' consent and want thereof, may be raised at any stage. U. S. Envelope Co. v. Transco. Paper Co. 229 F. 576.

"The courts hold that where the court does not have jurisdiction, the reasons signed by the court for the judgment rendered do not constitute a part of the judgment." 49 C. J. S., p. 51. Sec. 22. "A judgment rendered by a court in a controversy over which the court does not have jurisdiction is a nullity." Galley v. Hendricks, 127 S. W. 2d 978; 15 Tex. Jur. 2d, p. 477, Sec. 51.

WHEREFORE, the petitioner prays that the order heretofore denying him the writ of certiorari be set aside; and now reinstate the same and grant the petition for writ of certiorari; and on further consideration reverse and remand the same; or make the proper orders that the court might think best.

Sidney E. Dawson
Attorney for Petitioner.

And in the further alternative, the petitioner states that the Court of Appeals failed to pass on petitioner's Point I, in Appellant's brief, on a motion for new trial, reading (Sup. Ap.) p. 14.

> "The court erred in the failure to hold that the court had jurisdiction under Statute 42 U. S. C. A. 406 (b) (1), providing, among other things, that in a judicial proceeding resulting in a remand in favor of the claimant, the attorney has a right for the court to set a reasonable fee for his services not greater than 25 per cent of the accrued benefits coming to the claimant.

STATEMENT

If said Court had passed on said point, it would have shown them in all probability that an order on remand by the court is the same as a judgment, and that the petitioner would be entitled to a reasonable attorney's fee under said statute in the United States District Court.

ARGUMENT AND AUTHORITIES

In the case of Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 61, Headnote 8, as cited also in Supreme Court Rule 58(2) holding:

> "As the Court of Appeals did not pass upon other questions in the case, the causes will be reversed and remanded to it for further proceedings, in conformity with their opinion with respect to such claims . . . in suit, as appellants below submitted to the court for adjudication."

Here petitioner had 7 different cases holding that the attorneys who were successful in their claims were entitled to a reasonable fee under said statute.

The appellate court erred on page 9 (Sup. Ap.) of his opinion wherein he states:

> "Prior to the amendment of the Act in 1965 the Secretary was authorized to prescribe a maximum fee an attorney could charge for his service for representing a claimant before the Secretary. The Act did not provide for a maximum fee other than fixed by the Secretary. . . ."

And, in addition, on the same page states:

> "In order to control the charging of inordinately large fees by claimants' attorneys and to give assurance to attorneys that they would re-

> ceive appropriate fees for representing claimants in court; the ... department ... proposed the amendment of 206..."

In answer to the two propositions set out above, petitioner states, court stated "Prior to amendment of 1965, Secretary was authorized to prescribe maximum fees;...

This leaves the impression that in this case at bar, we are under the old rule. The new amendment was passed July 30, 1965, in which we are now under, because the claimant, Lee W. Weldon, filed his application on August 9, 1965, for liability benefits. (p. 14, Ap.).

In order to take care of the claimants when the lawyers charge inordinately large fees, Congress passed the amendment of the Act July 30, 1965, wherein lawyers according to most cases prosecute their cases through two forums. One in 406(a) where the Secretary is to safeguard the claimant's rights and give the attorney a reasonable fee; the other, 406 (b) (1) where the case is tried in the judiciary, the court is to safeguard both the claimant's and attorney's rights, and to see that the attorney gets a reasonable fee, and that the claimant is protected according to law. This is shown in the case of Sims v. Gardner, 378 F. 2d, 70 (1967) Sixth Circuit, which held:

> "Purpose of statute fixing 25 per cent maximum attorney's fee representation on claim for past due social security benefits is to pre-

vent attorneys from receiving inordinately large fees . . ."

The petitioner herein contends that since the trial and appellate court holds that an order of the court for a remand is not a judgment of the court, and the social security administration has jurisdiction, deprives the court from setting the petitioner a reasonable fee herein for service rendered in said judiciary.

This so effectively discourages attorneys from handling social security cases that the claimants are deprived of the assistance of counsel.

The appellate court herein in his opinion, on page 7 holds in substance that an attorney receives as much as 25 per cent of the past due benefits from his client in the administration proceeding, he is entitled to no more, and that he is prohibited to charge 25 per cent in the district court for his services there.

It is true that the Secretary did give petitioner 25 per cent of accrued benefits coming to the claimant of $625.57, but petitioner is due $121.50 for doctors' bills and reports; take that off and it leaves petitioner $504.07 and he is not allowed anything in the judicial proceedings wherein he rendered his legal services on remand.

It appears that according to the statute, that if claimant receives substantial gains from his attorney, he is limited to not in excess of 25 per cent of the past

due benefits coming to the claimant under 406(a) and the same under 406(b)(1).

There are two distinct and independent statutes — one forum has no jurisdiction over the other.

Now how can a court pass a law to that extent? Is that encroaching upon the rights of congress to make a law holding 25 per cent is all that petitioner can get in the case at bar?

Petitioner does not believe that he has had a fair trial in this cause, and that there has been a great miscarriage of justice.

Chief Judge, Haynesworth, in the case of McKittrick v. Gardner, 378 F. 2nd (1967) 4th Cir. 872 holds, among other things:

> "At an appropriate time, the congress might consider whether or not it is an unnecessary burden upon the lawyers to require them to prosecute two separate allowance applications, if one district court would suffice."

CONCLUSION

In order that this case may receive the full consideration that justice requires, we respectfully submit that this petition for rehearing should be granted, and that a rehearing of this case should be held before a full bench, more specifically for the setting of *the cause aside for lack of jurisdiction.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sidney E. Dawson, Attorney for Petitioner in the above entitled cause, hereby certify that on the ____ day of November, 1970, I served the attached brief upon Miss Kathryn Baldwin, Respondent, Washington, D. C., and Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530. All parties required to be served have been served, Rule 33, Sec. 3.

I further certify that this petition is presented in good faith, and not for delay; also certify that the petition is restricted to the grounds certified in Rule 58(2).

Sidney E. Dawson